IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.518/1997

Reserved on.27.6.2007

Decided on.30.8.2007

Padam Chand Sharma. **…Petitioner.**

Versus

High Court of Himachal Pradesh. **…Respondent**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*. yes.*

For the petitioner : Mr. Bimal Gupta, Advocate.

For the respondent Ms. Ranjana Parmar, Advocate.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the petitioner was appointed as a Clerk in the month of September 1964 in the Court of Sub Judge Ist Class, Kandaghat, District Solan and thereafter he was transferred to the Court of Senior Sub Judge, Shimla in the month of August, 1964. He joined the Registry of the High Court as Junior Translator in August 1971 and was promoted as Assistant in the year 1974. He was promoted as a Superintendent-cum-Leave Reserve Reader in the pay scale of Rs. 450-800 with effect from 5th March, 1977. He was confirmed against the post of Superintendent-cum-Leave Reserve Reader in the pay scale of Rs. 500-900 with effect from September 10, 1979. The Punjab Government created certain posts of Secretaries to the Ministers in the pay scale of Rs. 1400-1850 with a special pay of Rs. 250/- per month. The Punjab and Haryana High Court following the pattern of

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? yes.

the Punjab Government also created temporary posts of Secretaries in the pay scale of Rs. 1400-1850 with a special pay of Rs. 250/- per month. The Government of Himachal Pradesh also by following the Punjab pattern created certain posts of Secretaries to the Ministers in the H.P. Civil Secretariat in the pay scale of Rs. 1400-1850 with a special pay of Rs. 250/- per month. The posts were created by the Punjab and Haryana High Court of secretaries with effect from 23rd August, 1983. The High Court made recommendations to the Government of Himachal Pradesh for creation of two posts of Court Secretaries in the year 1983. The recommendations made by the High Court were considered by the State Government but the posts were created in the year 1987 with a rider that the same will be deemed to be created from the date of filling up the same. Two writ petitions bearing No. 39 of 1986 and 817 of 1986 were filed in the year 1986 by Sh. Mehar Singh and M.D. Kaushal. These two writ petitions were disposed of by this Court on 19.7.1989. The operative portion of the judgment dated 19.7.1989 reads thus:

> **"We allow these petitions only to the extent that a direction shall issue to the State Government to reconsider the question of sanctioning the creation of the posts of Secretary and Court Secretary with effect from the date suggested by the high Court, namely, August 23, 1983. It shall do so in the light of what we have said in this judgment."**

In sequel to the directions issued by this Court, the State Government vide notification dated 11.4.1997 altered the date by creating the posts of Court Secretaries with effect from 23rd August, 1983. It would be apt to note at this stage that the petitioner was considered along with Sh. D.D. Kukreti for the post of Court Secretary and was promoted in the year 1989.

Mr. Bimal Gupta, Advocate had strenuously argued that his client was required to be considered for promotion to the post of Court Secretary with effect from 23rd August, 1983 with consequential benefits. He had also contended that one Sh. Mehar Singh who was confirmed as Reader with effect from 5th March, 1977 could not be considered for promotion to the post of Court Secretary after the penalty of compulsory retirement was imposed upon him.

Ms. Ranjana Parmar, Advocate contended that the petitioner had no right to be considered for promotion retrospectively with effect from 23rd August, 1983 and if he was aggrieved of his non-consideration, he should have immediately approached the Court in the year 1987 when two posts were created.

I have heard the parties and perused the record.

The position which emerges from the pleadings of the parties is that the petitioner was confirmed as Reader with effect from 19th July, 1983 and one Sh. Mehar Singh was confirmed as Reader with effect from 5th March, 1977. Though detailed averments were made with regard to Sh. Mehar Singh to the effect that he was neither eligible nor qualified to be considered for promotion to the post of Court Secretary but his name was deleted from the array of respondents vide order dated 17th December, 1997. Since the name of Sh. Mehar Singh stood deleted at the request of the petitioner, the Court will not go into the allegations made against Sh. Mehar Singh in this writ petition.

Ms. Ranjana Parmar, Advocate had submitted that Sh. Mehar Singh, in fact had filed an independent writ petition bearing No. 180 of 1998 seeking promotion with effect from 23rd August, 1983. The petition filed by Sh. Mehar Singh was also heard with this petition.

Now, this Court has to consider the case of the petitioner independently on the basis of the pleadings contained therein by excluding the averments contained against Sh. Mehar Singh.

It is admitted fact that Sh. Mehar Singh was confirmed as a Reader with effect from 5th March, 1977 and the petitioner was confirmed on 19th July, 1983 as a Reader. This Court had directed the State to consider the creation of two posts of Court Secretaries with effect from 23rd August, 1983 instead of 1987. In sequel to the directions issued by this Court, the posts stood created with effect from 23rd August, 1983. Admittedly the Recruitment and Promotion Rules for the post of Court Secretary were notified vide notification dated 21st October, 1986. In the absence of the Recruitment and Promotions Rules to the post of Court Secretary, the incumbents were to be considered on the basis of seniority from the feeder cadre. The petitioner also fell in the zone of consideration on the basis of the seniority in the year 1983 and was to be considered for promotion with effect from 23rd August, 1983 instead of 7th January, 1989. It is settled law that in the absence of statutory rules, the promotions can be effected on the basis of the executive instructions.

The Apex Court has held in ***B.N. Nagarajan Versus State of Mysore,*** AIR 1966 SC 1942 that it is not obligatory under proviso to Article 309 of the Constitution of India to make Rules of recruitment etc. before a service can be constituted or a post created or filled. Their Lordships have held as under:

> **"It would be convenient to deal with this argument at this stage. Mr. Nambiar contends that the words "shall be as set forth in the rules of recruitment of such service special made in that behalf" clearly show that till the rules are made in that behalf no recruitment can be made to any service. We are unable to accept this contention. First it is not obligatory under proviso to Article 309 to make rules of recruitment etc.**

before a service can be constituted or a post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in Ram Jawaya Kapur V. State of Punjab, 1955-2 SCR 225: (AIR 1955 SC 549), that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these laws. We see nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law. It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule.

In the background of this position we are unable to interpret R. 3 of the General Recruitment Rules as suspending the executive power of the State till rules of recruitment of a service are specially made in that behalf. Rules usually take a long time to make, various authorities have to be consulted and it could not have been the intention of R. 3 of the General Recruitment Rules, 1957, to halt the working of the public departments till rules were framed. This Court considered a similar point in T. Cajee v. U Jormonik Siem, 1961-1 SCR 750 at pp. 762-764: (AIR 1961 SC 276 at p. 281), and arrived at a similar conclusion. The following observations of Wanchoo, J., who delivered the judgment on behalf of the majority, bring out clearly the fallacy in Mr. Nambiar's argument:

> **"The High Court has taken the view that the appointment and succession of a Siem was not an administrative function of the District Council and that the District Council could only act by making a law with the assent of the Governor so far as the appointment**

and removal of a Siem was concerned. In this connection, the High Court relied on Para 3 (1) (g) of the Schedule, which lays down that the District Council shall have the power to make laws with respect to the appointment and succession of Chiefs and Headmen. The High Court seems to be of the view that until such a law is made there could be no power of appointment of a Chief or Siem like the respondent and in consequence there would be no power of removal either. With respect, it seems to us that the High Court has read far more into Para 3 (1) (g) than is justified by its language. Paragraph 3 (1) is in fact something like a legislative list and enumerates the subjects on which the District Council is competent to make laws. Under Para 3 (1) (g) it has power to make laws with respect to the appointment or succession of Chiefs or Headmen and this would naturally include the power to remove them. But it does not follow from this that the appointment or removal of a Chief is a legislative act or that no appointment or removal can be made without there being first a law to that effect."

"Further once the power of appointment falls within the power of administration of the district the power of removal of officers and others so appointed would necessarily follow as a corollary. The Constitution could not have intended that all administration in the autonomous districts should come to a stop till the Governor made regulations under Para 19 (1) (b) or till the District Council passed laws under Para 3 (1) (g). The Governor in the first instance and the District Councils thereafter were vested with the power to carry on the administration and that in our opinion included the power to appoint and remove the personnel for carrying on administration. Doubtless when regulations are made under Para 19 (1) (b) or laws are passed under Para 3 (1) with respect to the appointment or removal of the personnel of the administration, the administrative authorities would be bound to follow the

> **regulations so made or the laws so passed. But from this it does not follow that till the regulations were made or the laws were passed there could be no appointment or dismissal of the personnel of the administration. In our opinion, the authorities concerned would at all relevant times have the power to appoint or remove administrative personnel under the general power of administration vested in them by the Sixth Schedule. The view, therefore, taken by the High Court that there could be no appointment or removal by the District Council without a law having been first passed in that behalf under Para 3 (1) (g) cannot be sustained."**
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> **Mr. Nambiar in this connection also relied on Articles 15 and 16 of the Constitution. He urged that if the executive is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309. Articles 15 and 16 would be breached because the appointments in that case would be arbitrary and dependent on the mere whim of the executive. We are unable to hold that Articles 15 and 16 in any way lead us to this conclusion. If the Government advertises the appointments and the conditions of service of the appointments and makes a selection after advertisement there would be no breach of Article 15 or 16 of the Constitution of India because everybody who is eligible in view of the conditions of service would be entitled to be considered by the State."**

The Apex Court in ***Sant Ram Versus State of Rajasthan***, AIR 1967 SC 1910 has held that that in the absence of any statutory rules governing promotions to selection grade posts the Government can issue administrative instructions. Their Lordships have held as under:

> **"We proceed to consider the next contention of Mr. N.C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the**

Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

The Hon'ble Supreme Court has held in ***Lalit Mohan Deb and others Versus Union of India and others*** (1973) 3 SCC 862 that there is no bar to the administration giving instructions regarding promotion to the higher grade as long as such instructions are not inconsistence with any Rule or subject. Their Lordships have held as under:

"It is true that there are no statutory rules regulating the selection of Assistants to the selection grade. But the absence of such rules is no bar to the Administration giving instructions regarding promotion to the higher grade as long as such instructions are not inconsistent with any rule on the subject. The point was considered by this Court in Sant Ram Sharma v. State of Rajasthan, and it was declared that in the absence of statutory rules regulating promotion to selection grade posts the Government is competent to issue administrative instructions as long as those instructions are not inconsistent with the rules already framed. Mr. Sen's argument is based on the absence of any statutory rule in this respect. Therefore, there is no question of any inconsistency with existing rules. In their affidavit in reply the Administration has stated that the appointment to the selection grade is made on the basis of seniority-cum-merit based upon a test open to all Assistants carried out in accordance with a prescribed procedure. It appears that there is a Departmental Promotion

Committee whose business is to prepare a promotion list of such Assistants who after passing the necessary tests are to be appointed in the selection grade. It is on the basis of this selection that respondents 4 to 20 and some others were appointed in the selection grade after they passed the tests and were selected by the Departmental Promotion Committee. The appellants did not appear for these tests and, therefore, can have no complaint about the selection. In fact they have not challenged the selection and appointment of respondents 4 to 20 in the selection grade posts."

The Hon'ble Supreme Court in ***Ramesh Prasad Singh Versus State of Bihar and others*** (1978) 1 SCC 37 that it is not obligatory to make rules of recruitment etc. before a service is constituted or a post is created or filled up:

"Regarding the observation of the high Court that in the absence of rules laying down qualifications for appointment and promotion to the post of Executive Engineer (Tele-Communication), respondents 3 to 28 could not be excluded from consideration for appointment to that post, we would like to say that though it cannot be gainsaid that before initiation of the proposal for creation of the post of Executive Engineer (Tele-Communication), respondents 1 and 2 had not framed any rules prescribed etc. before a service is constituted or a post is created or filled up. As is well known, the process of rule-making is a protracted and complicated one involving consultation with various authorities and compliance with manifold formalities. It cannot also be disputed that exigencies of administration at times require immediate creation of service or posts and any procrastination in that behalf cannot but prove detrimental to the proper and efficient functioning of public departments. In such like situations, the authorities concerned would have the power to appoint or terminate administrative personnel under the general power of administration vested in them as observed by this Court in B.N. Nagarajan V. State of Mysore and T. Cajee V. U. Jormanik Siem. It follows, therefore, that in the absence of rules,

qualifications for a post can validly be laid down in the self same executive order creating the service or post and filling it up according to those qualifications. In the instant case, it is evident from a perusal of the proposal for creation of a Tele Communication Division at Patna and the aforesaid recommendation made by the Selection Committee in favour of the appellant that for ensuring reliability and continuity in power supply it was absolutely essential that maintenance of the sophisticated wave-change-over communication equipments of 33 KV installed by the Board in the Tele-Communication Sub Division should be entrusted to specially trained, experienced and qualified officer possessing specialized theoretical and practical knowledge of Tele-Communication which is a subject quite distinct from that of general Electricity and covers according to New Encyclopedia Britannica (15th Edition) and Webster's Third New International Dictionary all types of communication at a distance as by cable, radio, telegraph, telephone, tele-typewriter and facsimile. Judged in this background, it is obvious that it was only the appellant who possessed degree in B.Sc. Engineering in Tele-Communication, was separately recruited and specially trained in that line in Switzerland and had thus acquired specialized knowledge therein and acquitted himself creditably in the filed for five years, who could be said to possess the requisite qualification and be considered fit and suitable for the job in question and not any one of respondents 3 to 28 who were mere graduates in Electrical Engineering, nor even respondents 3 and 4 who had studied Tele-Communication only as one of the subjects in their final B.Sc. Engineering Examination. It is patent; therefore, that the High Court was in error in thinking that respondents 3 to 28 possessed qualification equal to the appellant or that they were eligible for the job."

Similarly the Apex Court has held in ***Ravi Paul and others Versus Union of India and others*** (1995) 3 SCC 300 that it is not obligatory to make rules of recruitment etc. before a service is constituted for a post is

created or filled up and in the exercise of executive powers can make appointment in the absence of Rules. Their Lordships have held as under:

> **"As regards the absorption/appointment of the petitioners as Assistant Commandants in the BSF during the period 1974-78 it has already been noticed that initially, i.e. before the enactment of the BSF Act, appointment of superior officers in the BSF was governed by Rule 113 of the CRPF Rules. The enactment of the BSF Act in 1968 brought about a change. The said Act, in Section 4, provides for the constitution of the BSF and in sub-section (2) of Section 4 it is prescribed that subject to the provision of the BSF Act, the Force (BSF) should be constituted in such manner as may be prescribed and the condition of service of the members of the Force shall be such as may be prescribed. In sub-section (1) of Section 141 power has been conferred on the Central Government to make rules for the purpose of carrying into effect the provisions of the Act. In sub-section (2) of Section 141 it has been specifically provided that such rules may, inter alia, provide for the enrolment of the persons to the Force and the recruitment of the other Members of the Force [clause (b) and the conditions of service (including deductions from pay and allowances) of the members of the Force [clause (c)]. It would thus appear that after the enactment of the BSF Act in 1968, the CRPF Rules ceased to have application in the matter of recruitment to the BSF as well as the conditions of service of the members of the said force and the BSF was governed by the provisions of the BSF Act only. The BSF Act does not provide for continuing the applicability of CRPF Rules to the BSF. On the other hand, we find that in the matter of recruitment to the post of Assistant Commandant, the Central Government made BSF Recruitment Rules on 8.12.1969 which continued in force till they were repealed on 23.11.1973. Thereafter, recruitment to the post of Assistant Commandant in the BSF was governed by the executive order dated 16.1.1974 issued by the Government of India. In law it was permissible to do so because it is well settled that it is not**

obligatory to make rules for recruitment etc. before a service can be constituted or a post created or filled and the Government, in exercise of its executive power, can make appointments in the absence of rules. (See: B.N. Nagarajan v. State of Mysore).

Similarly the Apex Court in ***Nagpur Improvement Trust Versus Yadaorao Jagannath Kumbhare and others***, (1999) 8 SCC 99 has held that in the absence of statutory rules governing service conditions, executive instructions and/or decisions taken administratively operate and appointments/promotions can be made in accordance with such executive instructions/directions. Their Lordships of the Hon'ble Supreme Court have held as under:

"Even under section 24 (C) of the Act, if the State Government is of the opinion that the duties imposed on the Trust have not been performed or have been performed in an imperfect manner, then the State Government may direct the Trust to make arrangements for the proper performance of the duties or to take such measure as may be specified by the State Government. In view of the aforesaid provisions in the Act, the conclusion is irresistible that the State Government exercises effective control over the affairs of the Board including in the matter of appointments to different posts, if made by Board under its resolution. It is, no doubt, true that under Section 21 of the Act, the State Government is required to make rules prescribing the conditions under which members of the staff requiring professional skill could be appointed by the Trust. But when the State Government has not made any such rules even if the rules can be held to be of mandatory nature as has been held by the High Court, then it is difficult to comprehend that the Board is denuded of its general power of appointing and promoting people to different posts as provided under Section 22 of the Act. If the view of the High Court under the impugned judgment is taken to be correct then all appointments to different posts ever since 1936 have to be held to be invalid inasmuch no rules have

been framed by the State Government in exercise of the power under Section 21 of the Act. While interpreting the provisions of Section 21 of the Act, the High Court has lost sight of the general principle of service jurisprudence that in the absence of any statutory rules governing the service conditions of the employees, the executive instructions and/or decisions taken administratively would operate in the field and appointments/promotions can be made in accordance with such executive instructions/promotions can be made in accordance with such executive instructions/administrative directions. In this view of the matter and concededly, no rules having been framed by the State Government in exercise of power under Section 21 of the Act, the Trust/Board was fully empowered to take administrative decisions in the matter of appointments and promotions to different posts including the posts requiring professional skill and consequently the resolution of the Board taken in accordance with sub-section (2) of Section 22 of the Act deciding to promote the employees to the post of Assistant Engineer cannot be said to be invalid or inoperative. The High Court, therefore, in our view fell in error in holding that the appointments made to the posts of Assistant Engineer are invalid in law.

It was also brought to our notice that by notification dated 3.8.1937, a rule had been framed in exercise of power under Section 89 (1) (C) of the Nagpur Improvement Trusts Act which clearly indicated that except for the post of Executive Officer, Trust Engineer, Valuation Officer, the power of the Trust under Section 22 to appoint persons to posts requiring professional skill remained unaffected. The said notification is quoted in extenso:

"No. 7600-1302-M-XIII.-In exercise of the powers conferred by clause (C) of sub-section (1) of Section 89 of the Nagpur Improvement Trusts Act, 1930 (C.P. Act 36 of 1936), the Governor of the Central Provinces and Berar is pleased to make the following rules as to the conditions on which officers and servants of the Trust appointed to offices requiring professional skill may be appointed, suspended or dismissed:

RULES

1. In the case of the officers specified below no post shall be created or abolished, and no alteration in the emoluments thereof shall be made without the approval of the Provincial Government, and every appointment to or dismissal from any of the under-mentioned posts shall be subject to confirmation by the Provincial Government.

(1) Executive Officer

(2) Trust Engineer

(3) Valuation Officer

2. Subject to the provisions of Section 22 of the Act, the power of appointment to dismissal from and fixation of the emoluments of all other posts requiring professional skill shall be vested in the Trust."

The Hon'ble Supreme Court has held in ***Hon'ble Chief Justice, High Court of Bombay and others Vs B.S. Nayak and others,***, 2001 (IX) SCC 763 that in the absence of any Rules made by the Court or the Chief Justice the directions of the Chief Justice operates in the field of appointment. Their Lordships have held as under:

"The appointments to the posts of Private Secretaries in the High Court could be made by the Chief Justice as indicated in Article 229 of the Constitution. In the absence of any rules framed by the Court or the learned Chief Justice, the direction of the learned Chief Justice operates in the field of appointment. That being the position the Chief Justice was well within his jurisdiction in deciding the norms of merit-cum-seniority for filling up the posts of Private Secretaries and, in our opinion, that is the most befitting criteria for filling up the posts which takes into consideration the merit as of prime importance though seniority is not totally obliterated. We do not find any justification for the Division Bench of the High Court to strike down the criteria in question on the ground that the same had not been given due publicity. The question of giving publicity to the criteria would not arise as the learned Chief Justice has formulated the criteria for filling up the posts of Private Secretaries which he thought appropriate for efficient administration and for efficient discharge of the

> **duties of the Hon'ble Judges. It cannot be disputed that the Private Secretaries to the Hon'ble Judges play an important role in taking down dictations and writing judgments and, if merit is not given its due consideration and appointments are made on the basis of seniority, then it would be difficult for any Judge to discharge his obligations. We, therefore, find the impugned direction of the Division Bench of the Bombay High Court to be wholly unsustainable in law. We accordingly set aside the same and allow this appeal.**

In the present case no Recruitment and Promotion Rules were framed under Article 229 of the Constitution of India in the year 1983 for filling up the posts of Court Secretaries and the same could be filled up on the basis of the instructions/directions issued by Hon'ble the Chief Justice.

The Hon'ble Supreme Court in ***V.N. Meenakashi Versus Union of India and others***, 1999 SCC (L&S) 669 had directed to consider the case of the appellant for promotion even though she stood retired on superannuation during the pendency of the litigation. Their Lordships have held as under:

> **"We accordingly, set aside the order of absorption of respondent 5 as Joint Assistant Director under the Border Security Force. The impugned order of the Tribunal is accordingly quashed. Since the appellant claimed to be otherwise entitled for promotion to the post of Joint Assistant Director but in the meantime has retired on superannuation, her case may be considered for promotion to the post of Joint Assistant Director in accordance with law and if ultimately she is promoted to the post of Joint Assistant Director, then she would be entitled to the consequential enhancement in retiral benefits but will not be entitled to any arrears of salary on that score. Appeal is accordingly allowed but there will be no order as to cost."**

The contention put forth by Ms. Ranjana Parmar, Advocate that the promotions cannot be made retrospectively is untenable in view of the law

laid down by the Hon'ble Supreme Court in ***P.N. Chandandran Versus State of Kerala and others*** (2004) 1 SCC 245 wherein their Lordships have held as under:

> **"Sh. C.S. Rajan, the learned Senior Counsel appearing on behalf of the appellant contended that having regard to Rules 18 and 31 of the Rules, the private respondents could not have been promoted with retrospective effect. Drawing our attention to the counter-affidavit filed by the State, the learned counsel submitted that having not exercised its residual power under Rule 39of the Rules, the high Court must be held to have committed a manifest error in passing the impugned judgment. The learned counsel has further drawn our attention to an order of promotion dated 31.5.1977 and submitted that from a perusal thereof it would appear that the officer concerned was informed that he would be reverted to the cadre of SSA when the candidate selected by direct recruitment from SCs/STs through PSC for the post of Assistant Director (Soil Survey reports for duty. It is not in dispute that the State constituted a Departmental Promotion Committee and it, upon considering the respective cases of the private respondents herein, prepared a select list. The said select list was approved by the State and was published in the Kerala Gazette dated 20.11.1984. The private respondents, therefore, were promoted to the post of Assistant Director (Soil Survey)/Senior Chemist with retrospective effect from the date from which they were holding the said post i.e. from 1964 to 1980.**
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> **The State of Kerala in its counter-affidavit stated that since there was an administrative delay in convening the DPC, Rule 31 (a) (i) of the Rules was resorted to for temporarily promoting the departmental candidates and they were promoted as Assistant Director on a temporary basis under the said Rules pending convening of the DPC. The DPC was convened on 5.7.1984 and the promotions made from the years 1964 to 1980 were regularized with effect from 1964.**
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> **In view of the aforesaid statements, we do not find any irregularity in the matter of grant to promote the respondents**

with effect from 1964 onwards. Assuming that the contention to the effect that the Government does not have such powers under Rule 31 (1) (i) of the Rules is correct, but despite the same the order of promotion cannot be invalidated once the said power is traceable under Rule 39 of the Rules. Rule 39 of the Rules reads as under:

> **"39. Notwithstanding anything contained in these Rules or in the Special Rules or in any other rules or government orders the Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to the Government to be just and equitable:**
>
> **Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders."**

Rule 39 of the Rules is a residuary provision conferring overriding power and thus in terms thereof grant of promotion/appointment with retrospective effect is permissible.

It is not in dispute that the posts were to be filled up by promotion. We fail to understand how the appellant, keeping in view the facts and circumstances of this case, could question the retrospective promotion granted to the private respondents herein. It is not disputed that in view of the administrative lapse, the Departmental Promotion Committee did not hold a sitting from 1964 to 1980. The respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their part. It is also not disputed, that in ordinary course they were entitled to be promoted to the post of Assistant Director, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time,

> **although on a temporary basis, but were qualified at the time when they were so promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect.**

Similarly the contention of the learned Advocate appearing on behalf of the respondent that it is always open to the employer to fill up or not to fill up the posts is untenable. True it is that it is for the employer to fill up the vacancy, but there must be reasonable explanation for not making the promotion/appointment.

The Apex Court in ***K. Jayamohan Versus State of Kerala and another***, (1997) 5 SCC 170 has held that it is open to the Government not to make appointment even if vacancy exists but there must be reasonable explanation. Their Lordships have held as under:

> **"It is settled legal position that merely because a candidate is selected and kept in the waiting list, he does not acquire any absolute right to appointment. It is open to the Government to make the appointment or not. Even if there is any vacancy, it is not incumbent upon the Government to fill the same. But the appointing authority must give reasonable explanation for non-appointment. Equally, the Public Service Commission/ recruitment agency shall prepare a waiting list only to the extent of anticipated vacancies. In view of the above settled legal position, no error is found in the judgment of the High Court warranting interference."**

Ms. Ranjana Parmar, Advocate while concluding her arguments also contended that since the petitioner had been granted the pay scale with effect from 3rd July, 1985, he cannot seek the same now with effect from 23rd August, 1983.

The Hon'ble Apex Court in ***Dr. Sandhya Jain (Mrs) Versus Dr. Subhash Garg and another***, (1999) 8 SCC 449 has held that right to be considered for promotion at an earlier point of time cannot be said to have

wiped off by the subsequent promotion. Their Lordships have held as under:

> **"It has been brought to our notice that said Dr. Garg has in the meantime been promoted as Reader but still his right to be considered at an earlier point of time when he was not considered erroneously, cannot be said to have been wiped off by the subsequent promotion. In the aforesaid premises, we are of the considered opinion that the Tribunal rightly issued the impugned directions. We see no error in the same, so as to be interfered with by this Court."**

The High Court in fact had made the recommendations to the State Government on November 11, 1983 for sanctioning/creation of two posts of Court Secretaries with effect from 23rd August, 1983. Once the High Court itself was eager for creation of the posts with effect from 23.8.1983, and after the same have been created with effect from 23.8.1983 in view of letter dated 11th April, 1997, there was no reason why the petitioner could not be considered from the anterior date. The petitioner had only right to consideration for promotion and could not claim it as a matter of right but even that right has been denied to him. The ratio of the judgment rendered in ***M.D. Kaushal V. State of H.P. and another***, ILR (HP Series) 676 is also that the posts in question were to be created with effect from anterior date i.e. 23rd August, 1983. The idea for creation of these posts with effect from 23rd August, 1983 for all intents and purposes was that the same were also to be filled up from that date from the candidates available on that date.

The non-consideration of the petitioner for the post of Court Secretary with effect from 23rd August 1983 had direct bearing on the pensionary/retiral benefits to which the petitioner is entitled. If the petitioner had been considered for promotion with effect from 23rd August, 1983 and found suitable for promotion, he was to be granted the pay scale

of Rs. 1400-1850 instead of Rs. 825-1580 and the same was relevant for the purpose of computing the pensionary benefits.

Accordingly this writ petition is allowed and the respondent is directed to consider the case of the petitioner for promotion to the post of Court Secretary with effect from 23rd August, 1983 with other incumbents i.e. Sh. Mehar Singh and D.D. Kukreti and if he is found suitable, he will be entitled to the consequential enhancement in the retiral benefits, but will not be entitled to any arrears of salary on that score. There shall be no order as to costs.

(Rajiv Sharma), Judge

August 30, 2007
Awasthi